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Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2 (R4)-25–319 OF 2009
ROHANA YUSUF J
17 MARCH 2011

Administrative Law — Judicial review — Application for — Review of decision of first respondent — First respondent denied non-Muslim applicant's admission as peguam syarie — Whether first respondent was empowered to regulate qualification of peguam syarie — Whether word 'qualification' in legislation wide enough to permit first respondent to impose condition that peguam syarie must be Muslim — Whether r 10 unconstitutional and in contravention of art 8 of the Federal Constitution — Administration of Islamic Law (Federal Territories) Act 1993 s 59(1) & (2) — Peguam Syarie Rules 1993 r 10

Words and Phrases — Qualification — Definition of — Whether plain and ordinary meaning of word enough to allow first respondent to impose condition in r 10 — Administration of Islamic Law (Federal Territories) Act 1993 s 59(1) & (2) — Peguam Syarie Rules 1993 r 10

Victoria Jayaseele Martin ('the applicant'), an advocate and solicitor of the High Court of Malaya, applied to be admitted as a Syarie lawyer in Wilayah Persekutuan, Kuala Lumpur. Her application was denied on the grounds that she was not a Muslim. This was the applicant's application for judicial review of the decision by the Majlis Agama Islam Wilayah Persekutuan ('the first respondent'), on the grounds that the first respondent had acted with illegality, irrationality, unreasonableness and in excess of jurisdiction when it denied her admission as a Syarie lawyer in Wilayah Persekutuan because she was not a Muslim. By way of this application the applicant sought, inter alia, a declaration that r 10 of the Peguam Syarie Rules 1993 ('r 10') mandating that only Muslims may be admitted as syarie lawyer was ultra vires the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act') and also void for contravening arts 8, 5 and/or 10 of the Federal Constitution ('Constitution'); and an order of certiorari to quash the first respondent's decision. Meanwhile, the first respondent applied to strike out the application for judicial review as an abuse of process, frivolous and vexatious. The first respondent submitted that the civil court had no jurisdiction to hear this matter since it involved matters within the Shariah and that r 10 was valid and passed in accordance with the Act. Both the applicant's application for judicial review and the first respondent's striking out application were heard together.

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A The applicant submitted that under s 59(1) of the Act the first respondent must admit any person having sufficient knowledge of Islamic law as a syarie lawyer and that a person need not be a Muslim to have sufficient knowledge of Islamic Law. The applicant further argued that the first respondent's requirement that the person seeking appointment as a syarie lawyer must be a Muslim was an B additional requirement that the Legislature did not intend. As such it was the applicant's argument that the first respondent had exceeded its legislative power when it enacted r 10, which mandated that only Muslims may be admitted as a syarie lawyer. The first respondent submitted that it was empowered under s 59(2) of the Act to legislate on the qualification of a Syarie C lawyer and that r 10, which required the person seeking appointment as a syarie lawyer to be a Muslim, was made under s 59(2) of the Act.

Held, dismissing the applicant's application and the first respondent's D application:

(1) Since s 59(1) of the Act begins with the opening words 'subject to subsection (2)' it must be read subject to sub-s (2). In clear plain language it means that the discretion of the first respondent to admit any person with sufficient knowledge of Islamic law to be a Syarie lawyer is subject to E sub-s (2) and that s 59(1) did not stand alone without condition. Further the words 'may admit' in s 59(1) of the Act denote that it is not mandatory for the first respondent to admit a person solely on the basis of having sufficient knowledge of Islamic Law. It was the intent of the Legislature to delegate to the first respondent the power to determine the F necessary qualification at its discretion. Hence the first respondent was empowered to add, vary or to limit the said qualification. As such, the first respondent was empowered, by virtue of s 59(2) of the Act, to regulate the qualification of a Syarie lawyer (see paras 15–17).

G (2) In the absence of the definition of 'qualification' in the Act or in the Interpretation Act, the plain and ordinary meaning of the word had to be adopted. It was found that the plain and ordinary meaning of the word 'qualification' was wide enough to allow the first respondent to impose the condition appearing in r 10. The first respondent had in its wisdom, H based on its interpretation of the Shariah, seen it fit to require such qualification and as such, it was neither proper for this court to doubt nor question the wisdom of the first respondent in imposing such a condition. The decision of the first respondent is based on its interpretation of the Islamic jurisprudence. Unless a challenge is made on I the correctness of the first respondent's interpretation, its decision remains (see paras 18–22, 27 & 28).

(3) It was found that if the legislature deemed it necessary that for the purpose of achieving the object of the Act, it required a rule that only a Muslim may be admitted as a syarie lawyer and that rule was made

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directed to the problem, manifest by experience and that it discriminated on adequate grounds, then the law did not violate art 8 of the Constitution and it was good law. Further having a syarie lawyer who professes the religion of Islam will achieve the object of the Act; faith being a dimension necessary in its approach. In such a case there was nexus between the impugned rule and the object of the Act. Therefore the impugned r 10 did not contravene art 8 of the Constitution and was not unconstitutional (see paras 37–41).

(4) As this matter involved an issue of public interest, each party was to bear its own costs (see para 44).

[Bahasa Malaysia summary

Victoria Jayaseele Martin ('pemohon'), seorang peguamcara dan peguambela Mahkamah Tinggi Malaya, telah memohon untuk diterima masuk sebagai peguam syarie di Wilayah Persekutuan, Kuala Lumpur. Permohonan kemasukannya telah dinafikan atas alasan bahawa dia bukan beragama Islam. Ini merupakan permohonan pemohon untuk semakan kehakiman keputusan oleh Majlis Agama Islam Wilayah Persekutuan (responden pertama), atas alasan bahawa responden pertama telah bertindak dengan kepenyalahan undang-undang, tidak rasional, tidak berpatutan dan dengan bidang kuasa yang berlebihan apabila ia menafikan kemasukannya sebagai peguam syarie di Wilayah Persekutuan disebabkan dia bukan beragama Islam. Melalui permohonan ini pemohon memohon, antara lain, deklarasi bahawa k 10 Kaedah-Kaedah Peguam Syarie 1993 ('k 10') yang mana memberikan mandat bahawa hanya orang yang beragama Islam boleh diterima masuk sebagai peguam syarie adalah ultra vires Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ('Akta') dan juga tidak sah kerana bercanggah dengan perkara 8, 5 dan/atau 10 Perlembagaan Persekutuan ('Perlembagaan'); dan perintah certiotari untuk membatalkan keputusan responden pertama. Sementara itu, responden pertama telah memohon untuk membatalkan permohonan untuk semakan kehakiman sebagai penyalahgunaan proses, remeh dan menyusahkan. Responden pertama berhujah bahawa mahkamah sivil tidak mempunyai bidang kuasa untuk mendengar perkara ini memandangkan ia berkenaan dengan perkara-perkara dalam lingkungan Syariah dan bahawa k 10 adalah sah dan diluluskan mengikut Akta tersebut. Kedua-dua permohonan pemohon untuk semakan kehakiman dan pembatalan permohonan responden pertama didengar bersama. Pemohon berhujah bahawa di bawah s 59(1) Akta, responden pertama harus menerima masuk sesiapa yang mempunyai pengetahuan yang mencukupi tentang undang-undang Islam sebagai peguam syarie dan bahawa seseorang tidak mestinya beragama Islam untuk mempunyai pengetahuan yang mencukupi tentang undang-undang Islam. Pemohon selanjutnya menghujahkan bahawa keperluan responden pertama bagi seorang yang memohon pelantikan sebagai peguam syarie hendaklah beragama Islam adalah

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keperluan tambahan yang mana tidak dimaksudkan oleh Perundangan. Oleh itu, adalah menjadi hujahan pemohon bahawa responden pertama telah melepasi kuasa perundangannya apabila ia menggubal k 10, yang mana memberi mandat bahawa hanya seorang Islam boleh diterima masuk sebagai peguam syarie. Responden pertama berhujah bahawa ia diberi kuasa di bawah s 59(2) Akta untuk menggubal kelayakan seorang peguam syarie dan bahawa k 10, yang mana menghendaki seorang yang memohon pelantikan sebagai peguam Syarie beragama Islam, adalah dibuat di bawah s 59(2) Akta.

Diputuskan, menolak permohonan pemohon dan permohonan responden pertama:

(1) Memandangkan s 59(1) Akta bermula dengan kata-kata pembuka 'subject to subsection (2)' ia hendaklah dibaca tertakluk kepada sub-s (2). Dengan bahasa yang jelas dan ringkas, ia bermaksud bahawa budi bicara responden pertama untuk menerima masuk sesiapa dengan pengetahuan undang-undang Islam yang mencukupi sebagai peguam Syarie adalah tertakluk kepada sub-s (2) dan bahawa s 59(1) adalah bukan tanpa syarat. Selanjutnya perkataan 'may admit' di dalam s 59(1) Akta menandakan bahawa adalah tidak mandatori untuk responden pertama menerima masuk seseorang semata-mata atas dasar mempunyai pengetahuan undang-undang Islam yang mencukupi. Adalah menjadi niat badan perundangan untuk memberi responden pertama kuasa untuk menentukan kelayakan yang berpatutan atas budi bicaranya. Justeru responden pertama adalah diberikan kuasa untuk menambah, mengubah atau menghadkan kelayakan tersebut. Oleh itu, responden pertama telah diberikan kuasa, menurut s 59(2) Akta, untuk mengawal selia kelayakan seorang peguam syarie (lihat perenggan 15–17).

(2) Dalam ketiadaan definisi 'qualification' di dalam Akta tersebut atau di dalam Akta Tafsiran, maksud jelas dan biasa perkataan hendaklah digunakan. Adalah didapati bahawa maksud jelas dan biasa perkataan 'qualification' adalah cukup luas untuk membenarkan responden pertama untuk mengenakan syarat yang terdapat di dalam k 10. Responden pertama dalam kewajarannya, berdasarkan tafsiran Syariah, menganggap adalah bersesuaian untuk memerlukan kelayakan tersebut dan oleh itu, adalah tidak wajar bagi mahkamah ini untuk meragui atau menyoal kewajaran responden pertama dalam mengenakan syarat sedemikian. Keputusan responden pertama adalah berdasarkan tafsirannya sendiri tentang jurisprudens Islam. Melainkan bantahan telah dibuat terhadap ketepatan tafsiran responden pertama, keputusannya dikekalkan (lihat perenggan 18–22, 27 & 28).

(3) Adalah didapati bahawa sekiranya badan perundangan merasakan patut bahawa bagi tujuan mencapai objektif Akta, ia memerlukan peraturan di mana hanya seorang Islam boleh diterima masuk sebagai peguam syarie

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dan bahawa peraturan tersebut telah dibuat untuk menangani masalah tersebut, dikukuhkan dengan pengalamanan dan bahawa ia mendiskriminasi atas alasan yang secukupnya, oleh itu undang-undang tersebut tidak bercanggah dengan perkara 8 Perlembagaan dan merupakan undang-undang yang baik. Tambahan, dengan mempunyai peguam syarie yang menganut agama Islam, ia dapat mencapai objektif Akta; kepercayaan menjadi ukuran yang diperlukan dalam pendekatannya. Dalam kes sedemikian terdapat kaitan di antara peraturan yang dipersoalkan dengan objektif Akta. Lanjutan itu k 10 yang dipersoalkan tidak bercanggah dengan perkara 8 Perlembagaan dan adalah berperlembagaan (lihat perenggan 37–41).

(4) Melihatkan bahawa perkara ini melibatkan isu kepentingan awam, setiap pihak hendaklah menanggung kos masing-masing (lihat perenggan 44).]

Notes

For cases an application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

Cases referred to

Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara [2010] 4 MLJ 1; [2010] 3 CLJ 643, FC (refd)

Abdul Ghani bin Ali @ Ahmad & Ors v PP [2010] 3 MLJ 561; [2001] 3 CLJ 769, FC (refd)

Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69, FC (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council) Malaysia, intervener) [2004] 2 MLJ 257, FC (refd)

Datuk Hj Harun Idris v Pp [1977] 2 MLJ 155, FC (refd)

Malaysian Bar v Government of Malaysia & Anor [1987] 2 MLJ 165, SC (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105, FC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2009] 6 MLJ 416; [2010] 4 CLJ 388, HC (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 ss 10, 34, 34(4), 59(1), (2)

Federal Constitution arts 5, 5(1), 8, 8(1), (2), (5), (5)(b), 10, 10(1)(c)

Interpretation Acts 1948 and 1967

Legal Profession Act 1976

Peguam Syarie Rules 1993 r 10

Rules of the High Court 1980 O 18 r 19

Syariah Court Civil Procedure (Federal Territories) Act 1998

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Ranjit Singh (Jamie Wong with him)(Ranjit Singh & Yeoh) for the applicant.
Sulaiman Abdullah (Abdul Rahim Sinwan and Zulkifli Che Yong with him) (Zulkifli Yong Azmi & Co) for the first respondent.
Noorhisham Ismail (Arik Sanusi bin Yeop Johar, Senior Federal Counsel and Haryati Ahmad, Federal Counsel with him) (Senior Federal Counsel, Attorney General's Chambers) for the second respondent.

Rohana Yusuf J:

[1] The applicant, Victoria Jayaseele Martin, is an advocate and solicitor of the High Court of Malaya. She applied to be admitted as *peguam syarie* in Wilayah Persekutuan, Kuala Lumpur. Her application was denied by *Jawatankuasa Peguam Syarie* vide a letter dated 9 September 2009 shown in exh 'VM13' on the ground that she did not meet the qualification provided under Peguam Syarie Rules 1993 (PU(A) 408/1993), that is, she was not a person who professed the religion of Islam. In other words, she was not a Muslim.

[2] She now applies to this court for judicial review of that decision and prays for the following:

(a) a declaration that, that part of r 10 of the Peguam Syarie Rules 1993 (r 10) mandating that only Muslims may be admitted as *peguam syarie* is ultra vires the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505);

(b) a declaration that, that part of r 10 mandating that only Muslims may be admitted as *peguam syarie* is in contravention of arts 8(1) and or 8(2) and or art 5 and or art 10(1)(c) of the Federal Constitution and as a consequence, is void;

(c) an order of certiorari to quash the decision of the respondent which refused to process the applicant's application to be admitted as *peguam syarie*.

(d) an order of mandamus to compel the respondent to receive and process the applicant's application to be admitted as *peguam syarie* without regards to the fact that the applicant is not a Muslim; and

(e) such further and or other consequential reliefs or directions as this court deems fit and just to give.

[3] The grounds of the judicial review are that the first respondent, Majlis Agama Islam Wilayah Persekutuan ('the Majlis') in denying the applicant on the ground that she was not a Muslim, had acted with illegality, irrationality,

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unreasonableness and in excess of its jurisdiction. She also contended that the Majlis had taken into account what ought not to have been taken.

[4] Leave was granted by this court on 14 May 2010 despite resistance from the attorney general's chambers on the issue of jurisdiction.

[5] Meanwhile, the Majlis took out an application under O 18 r 19 of the Rules of the High Court 1980 to strike out the application for judicial review on the grounds specified in encl 17. Essentially the objections raised are these; that the civil court has no jurisdiction to hear this matter since it involves matters within the Syariah, that r 10 is valid and passed in accordance with Act 505 and that the applicant had failed to challenge the constitutionality of the related statutes. Hence, the application for judicial review is said to be an abuse of process, frivolous and vexatious.

ISSUES

[6] I note that the applications in encl 1 and encl 17 are premised on issues that are not too dissimilar for determination by this court. For that reason I made an order that both the applications are to be heard together. The issues for determination in these applications are as follows:

(a) Whether r 10 which imposes the requirement that an applicant must be a Muslim as a qualification for admission as *peguam syarie* is ultra vires the following:

(i) Act 505;

(ii) art 8, art 5 and art10 of the Federal Constitution;

(b) Whether the civil court has the jurisdiction to determine this issue.

WHETHER R 10 IS ULTRA VIRES ACT 505

[7] On the first issue, learned counsel for the applicant, Encik Ranjit Singh (Cik Jamie Wong with him), contended that r 10, which was made under Act 505, is ultra vires s 59(1) of Act 505 itself. He argued that r 10 was made outside the ambit and requirement of s 59(1), which stipulates that 'the Majlis may admit any person having sufficient knowledge of Islamic law to be *peguam syarie* …'. It was further submitted that by the wording in s 59(1) the Majlis must admit any person having sufficient knowledge of Islamic law. There is no other condition save and except for that. He then said that a person need not be a Muslim to have sufficient knowledge of Islamic law. Therefore the requirement that the person must be a Muslim, according to Encik Ranjit Singh, is an additional requirement that the Legislature did not intend. By reason thereof, he contended that the *Majlis* had exceeded the legislative power

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granted to it in enacting r 10 which provides for the additional requirement, applying the purposive rule of interpretation. On this basis he concluded that r 10 is ultra vires Act 505.

[8] For the Majlis, learned counsel Tuan Hj Sulaiman Abdullah (Tuan Hj Zulkifli bin Che Yong with him) contended that the *Majlis* is empowered under s 59(2) to legislate on the qualification of *peguam syarie* as it is within its legislative power. He submitted that s 59(1) provides only the 'necessary condition' but not 'sufficient conditions' to qualify as *peguam syarie*. The determination of sufficient qualification of *peguam syarie* is a matter within the Syariah that only the *Majlis* is competent to determine. This power is delegated to the *Majlis* by the Legislature because, in Tuan Haji Sulaiman's view, the Legislature acknowledged that the *Majlis* would be in the best position to determine this matter. Along this line, he also argued that the Legislature may be made up of persons who are not well versed in the area or the requirement of the Syariah with regard to this matter. For that reason the Legislature had decided to delegate this power to the *Majlis*.

[9] Tuan Hj Sulaiman had also drawn the attention of this court to the decision of learned High Court judge of Syariah which stressed the importance of *peguam syarie* to be a person who professes the religion of Islam based on findings of the Syariah, which is similar to the position taken in the fatwa made by the Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia Ke 92 on the 16 December 2010; both of which I take judicial notice of (see exh WMS1 enclosed 40).

[10] Learned senior federal counsel Encik Arik Sanusi, (senior federal counsel Encik Noor Hisham Ismail, and federal counsel Puan Haryati Ahmad with him) argued that s 59(2) allows the *majlis* to regulate on, amongst others, *qualification* of *peguam syarie*. It is therefore in the wisdom of the *Majlis*, based on Syariah interpretation, that one of the qualifications for admission as *peguam syarie* is that the applicant must be a Muslim.

[11] Learned senior federal counsel also submitted that the word *qualification* used in s 59(2) is not defined in Act 505 or the Interpretation Acts 1948 and 1967. The word *qualification* therefore should be given its plain and ordinary meaning. A few dictionary meanings of the word *qualification* had been brought to the attention of this court.

FINDINGS

[12] The Peguam Syarie Rules 1993 is a subsidiary legislation made by the *Majlis* with the approval of Yang di Pertuan Agong. Rule 10 is made under

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s 59(2) of Act 505. To appreciate the full effect of these provisions, it would no doubt be useful to produce them herein as below:

59. Peguam Syarie

(1) Subject to subsection (2), the Majlis may admit any person having sufficient knowledge of Islamic Law to be Peguam Syarie to represent parties in any proceedings before the Syariah Court.

(2) The Majlis may, with the approval of the Yang di Pertuan Agong, make rules:

(a) to provide for the procedure, qualifications and fees for the admission of Peguam Syarie; and

(b) to regulate, control and supervise the conduct of Peguam Syarie.

(3) Notwithstanding subsection (1), the Majlis may exempt any member of the Judicial and Legal Service of the Federation or any person appointed under section 3 of the Legal Aid Act 1971 from the provisions of this section.

(4) Notwithstanding anything contained in any other written law, no person other than Peguam Syarie or a person exempted under subsection (3) shall be entitled to appear in any Syariah Court on behalf of any party to any proceedings before it.

[13] Under the above provisions the *Majlis* in empowered to make rules in two broad areas; that are firstly, to provide procedure, *qualifications* and fees for the admission of *peguam syarie* and secondly, to regulate, control and supervise the conduct of *peguam syarie*.

[14] From these empowering provisions, the *Majlis* enacted the impugned r 10, which provides as follows:

(a)

(i) is a Muslim and has passed the final examinations which leads to the certificate of bachelor's degree in Syariah from any university or any Islamic educational institution recognised by the Government of Malaysia;

(ii) is a Muslim member of the judicial and legal service of the Federation;

(iii) is a Muslim advocate and solicitor enrolled under the Legal Profession Act 1976;

(iv) has served as Syariah Judge or as a Kathi with any State Government in Malaysia for a period of not less than seven years;

(b) has attained the aged of twenty-one years;

(c) is good behaviour and:

(i) has never been convicted in Malaysia or any other place of any criminal offence;

(ii) has never been adjudged a bankrupt;

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(d) is a Malaysia citizen;

(e) as an advocate and solicitor, has passed the *Sijil Peguam Syarie* examination.

[15] For the purpose of appreciating the application of r 10 in relation to s 59(1) of Act 505, it is crucial to determine the ambit and the language used in the section. It must be noted that s 59(1) begins with the opening words 'subject to subsection (2), the majlis may admit any person with sufficient knowledge of Islamic law to be *peguam syarie* …' In clear plain language, the provision must be read subject to sub-s (2). It means that the discretion of the *Majlis* to admit any person with sufficient knowledge of Islamic law to be *peguam syarie* is subject to sub-s (2). It does not stand alone without condition.

[16] To my mind 'admission' is at the discretion of the *Majlis* because the word 'may' is used in s 59(1) of Act 505. The word 'may admit' denotes that it is not mandatory for the *Majlis* to admit a person solely on the basis of having sufficient knowledge of Islamic law. In my view this provision must be read to mean that the *Majlis* in exercising its discretion is subject to the rules made under sub-s (2). So even if a person has sufficient knowledge of Islamic law, the *Majlis* may still decline an application for admission on other grounds and this could be for reasons stipulated in sub-s (2).

[17] From my reading of these provisions the intent of the legislature is clear. In plain language of this provision alone I am unable to agree with the contention by Encik Ranjit Singh that, the words 'a person with sufficient knowledge of Islam law' is all that is required for the purpose of admission under s 59(1). Such cannot be what s 59(1) contemplates. It is also clear that it is the intent of the legislature to delegate to the *Majlis* the power to determine the necessary qualification at its discretion. Hence the *Majlis* is empowered to add vary or to limit the said qualification. Whether or not the imposition of the requirement that a person must be a Muslim is within the power of *Majlis* must therefore depend on the meaning of the word qualification used in that section. If the Legislature had intended that knowledge of Islamic law per se is sufficient then s 59(1) would have been enacted to read instead, 'The Majlis shall admit any person having sufficient knowledge of Islamic Law …'. Since the opening words of s 59(1) begin with 'subject to subsection (2)', it is clear that the qualification of a person with sufficient knowledge of Islamic law in that s 59(1) is subject to the power given to the *Majlis* in sub-s (2). That being the case, I hold that the *Majlis* is empowered by virtue of s 59(2) to regulate the qualification of a *peguam syarie*.

[18] In exercising its legislative power, the *Majlis* may provide for procedure, qualification and fees of *peguam syarie*. The *Majlis* had provided for this through the Peguam Syarie Rules 1993 (PU (A) 408/1993). My next task then

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is to determine if the word qualification used in the legislation is wide enough to permit the *Majlis* to impose a condition that a *peguam syarie* must be a Muslim.

[19] For the purpose of determining the meaning of qualification in s 59(1), I am inclined to accept the submission of learned senior federal counsel that in absence of the definition of qualification in Act 505 or in the Interpretation Acts 1948 and 1967, the plain and ordinary meaning of the word is to be used, as decided in *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69. The dictionary meanings of word qualification are enumerated in the written submission of learned senior federal counsel. First, the meaning found in the *Concise Oxford English Dictionary*, (11th Ed), which states as this:

> *Qualification: 1. The action of qualifying or the fact of becoming qualified. 2. a pass of an examination or an official completion of course. 3. a quality that qualifies someone for a job or activity. 4. a condition that must be fulfilled before a right can be acquired. 5. a statement or assertion that qualifies another.*
>
> Black's Law Dictionary, *(9th Ed), qualification means: Qualification. (16c) 1. The possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function <voter qualification requires one to meet residency, age, and registration requirements>. (Cases: Officers and Public Employees 35.) 2. A modification or limitation of terms or language; esp., a restriction of terms that would otherwise be interpreted broadly <the contract container a qualification requiring the lessor's permission before exercising the right to sublet> 3. CHARACTERIZATION (1) - qualify, vb.*

[20] In summary the word qualification or *kelayakan* as used in s 59(2) is wide enough to include the possession of qualities or properties such as fitness or capacity which is inherently or legally necessary to enable one to be eligible for a position or office. This includes modification or limitation or restriction or even characterisation. The same meaning is found in the P Ramanatha Aiyar's, *The Law Lexicon With Legal Maxim, Latin Terms and Words & Phrases*, (2nd Ed) 1977. Therefore in its plain and ordinary meaning the word, qualification is certainly wide enough to allow the *Majlis* to impose the condition appearing in r 10.

[21] In observing the scheme and purpose of the delegation of power to the *Majlis*, I cannot help but agree with learned counsel Tuan Hj Sulaiman that s 59(1) merely provides the necessary condition but not sufficient condition to qualify a person for admission as *peguam syarie*. The power delegated to the *Majlis* is sufficiently wide to enable the *Majlis* to enact a condition that an applicant for admission as *peguam syarie* must be a Muslim, in addition to having sufficient knowledge of Islamic law.

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[22] At this juncture, perhaps it would be appropriate for me to make my position clear. To obviate any doubt, I am not, in any way, adjudicating on the wisdom of the *Majlis* in imposing such a condition, which was, as I understand it, based on its interpretation of the Syariah. This, I believe, is not within the preview of this court. I am only concern here with the exercise of power by the *Majlis* in relation to the law and its validity juxtaposed with the relevant provisions of the Federal Constitution. The *Majlis* had, in its wisdom, based on its interpretation of the Syariah, seen it fit to require such qualification. In the circumstances, it is therefore neither proper for this court to doubt nor question the wisdom of the *Majlis* in imposing such a condition. I will deliberate on the issue of constitutionality in the foregoing paragraphs.

[23] It is pertinent to note that the *Majlis* was created by Act 505 and is entrusted with various functions and duties thereunder. The powers relating to the Syariah courts are in part IV and on the prosecution and representation in Syariah court are that in part V. The rationale of the Legislature in delegating the power to the *Majlis* to determine matters within the Syariah had been clearly explained by learned counsel Tuan Hj Sulaiman. It makes good sense to delegate such power considering that the legislature may not always be in the position to appreciate matters of Syariah. The constituent of the *Majlis* as found in s 10 is made up of amongst others five persons learned in Islamic studies. Tuan Hj Sulaiman had also addressed the court on the underlying reasons for the Majlis to impose such a condition as found in the decision of the *Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan* in exh WMS1 in encl 40.

[24] Having said that, I should not allow myself to be placed in a somewhat precarious position of delving into the fatwa here, notwithstanding that parties had gone to great length to deliberate on the fatwa relating to the requirement that a *peguam syarie* must be a Muslim. I agree with Encik Ranjit Singh that the fatwa issued by the *Muzakarah Jawatankuasa Fatwa Kebangsaan Malaysia* in exh WMS1 was not one issued under s 34 as required under Act 505. The fatwa, if it was issued under that section, must be recognised by all the Syariah Courts of Wilayah Persekutuan under s 34(4). Nevertheless I take judicial notice of the Syariah interpretation relied by the *Majlis* in making the impugned decision.

[25] My attention has further been drawn to the disparity in practice in different states in relation to the admission of *peguam syarie*. I was urged by Encik Ranjit Singh to note that the position in the State of Selangor and Kelantan is to allow non-Muslim to be a *peguam syarie*. I see two reasons why this could have happened. First, it must be borne in mind that the state legislature may enact laws on its own autonomy in relation to matters within the State Legislative List, in the Ninth Schedule, List II of the Federal Constitution. Hence on matters within the State Legislative List, it is no

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surprise that there could be disparity and differences between enactments of one state with another. A simple example that immediately comes to my mind is the differences in the interpretation of 'Malay' in the various state enactments relating to Malay Reserve Land. The definition of 'Malay' in these enactments differs in as many as the number of the states in Malaysia.

[26] I am not too clear though as to the purpose of addressing this issue of disparity of practice. If the purpose is to convince this court that since the states of Selangor and Kelantan allow a person who is a non-Muslim to be a *peguam syarie*, therefore the position in Wilayah Persekutuan Kuala Lumpur should be likewise, I regret to say that I am unable to agree, although that may be ideal. The fact of the matter is that there are differences in Syariah interpretation and this would account for the second reason for such disparity, which I shall next elaborate.

[27] Disparity may also be to the differences in the interpretation of the Syariah by scholars on this issue. This divergence has always been accepted in Islam so long as it does not transgress the primary principle of the Syariah. The fact that there are non-Muslim *peguam syarie* in other States of Malaysia or that the legal position was different before than now means that there is more than one acceptable Syariah interpretation on this particular matter. Though personally I am inclined to agree that it would have been more appropriate to allow non-Muslim to be a *peguam syarie* in a multi racial and multi religious society, I am however in no position to question the choice made or the wisdom of the *Majlis* in accepting a given interpretation.

[28] In a situation where the Syariah is subject to many acceptable interpretations, it is entirely for each State Legislature in its wisdom to choose which of interpretation the particular state deems appropriate and applicable to its people. After all, in a democratic country, it is the people of the state that chooses its government through the election process. In the present case I have the occasion to address this issue in my earlier decision in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd & another suit* [2009] 6 MLJ 416; [2010] 4 CLJ 388. To avoid my repetition on this issue, suffice is to say, the state government here too, based on the doctrine of siasah Syariah, has the right to choose which amongst the different interpretations would reflect the wishes, aspiration and need of its people (see Mohamed Hashim Kamali, on *Siasah Syariah or the Policies of Islamic Government* in the American Journal of Islamic Social Sciences Vol 6 No 1 1989). The decision of the *Majlis* is based on its interpretation of the Islamic jurisprudence. Unless a challenge is made on the correctness of the *Majlis's* interpretation, its decision remains.

[29] With regard to the purposive interpretation, it may be necessary that a *peguam syarie* must be a Muslim for the purpose of achieving the object of Act

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505, which is to enforce and administer Islamic law as well as to provide for the constitutions and organisation of Syariah court. The Syariah court has jurisdiction only over persons professing the religion of Islam (see para 1, List II, 9th Schedule of the Federal Constitution). Persons appearing before the Syariah courts therefore should also be subject to its jurisdiction. The Syariah courts must be able to enforce its laws and rules on a *peguam syarie*, as for instance, when contempt or any breach of the rules is committed.

[30] Encik Ranjit Singh also suggested that such decision by the *Majlis*, if goes unchecked and if stretched to its extreme, would even allow the Majlis to impose a condition or qualification, such as only a male Muslim or a person who had performed the Hajj only may be admitted as *peguam syarie*. To my mind, such extremity is most unlikely. The Syariah, like equity, is based on good conscience and common sense. Above all else, the Syariah has its sources firstly in the divine Quran followed by the *Sunnah, Ijma, Qiyas* and *Ijtihad*. The Syariah has its own rules of interpretation and requires an intelligent empirical approach founded on dialectics, forces in the academe, characteristics of races, societies and epochs depending upon their customs, traditions and particular culture of a particular society, which are acceptable in the *Usul-Fiqh*. I do not propose to elaborate on the rules of interpretation of the Syariah but I am confident that the Syariah simply cannot condescend to such absurdity especially when the object of the Syariah is to enjoin good and forbid evil. To suggest that the Syariah delved in such absurdity would seem rather naive. It simply exhibits a degree of ignorance of these processes which is quite perplexing, especially so coming from the applicant who, I take it, has sufficient knowledge in Islamic law. Suffice to say that if there is such absurdity, it can easily be demolished upon proper application of the Syariah interpretation. As I have earlier stated, in the present case there is no challenge made on the Syariah interpretation before this court. The decision of *Majlis* remains a good Syariah interpretation.

WHETHER R 10 IS UNCONSTITUTIONAL IN CONTRAVENTION OF ART 8

[31] I shall now come to deal with the issue of unconstitutionality. The question therefore is whether r 10 is repugnant to the relevant provisions of the Federal Constitution. Encik Ranjit Singh contended that r 10 is unconstitutional as it violates the equal protection clause of art 8(1). He contended that r 10 is discriminatory and is unconstitutional in the light of art 8(2). The exception in art 8(5) of the Federal Constitution, according to him, does not apply because this discrimination does not fall under these exceptions. It is also his contention that art 8(5)(b) the exception to discriminatory practice cannot apply because cl (b) only allows prohibition or restriction of office or employment. Legal practice is a profession and is not covered by this provision.

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However, he conceded that case laws allow discrimination on the ground of reasonable classification based on intelligible differentia but he contended, there is no nexus between the classifications in question with the object of Act 505.

[32] Learned senior federal counsel Encik Arik Sanusi does not differ in his view with Encik Ranjit Singh on the interpretation and implication of art 8. It is clear from decided cases such as the case of *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165, that equal protection is not absolute and it does not mean that all laws passed by a legislature cannot create differences as to whom they apply. The doctrine of reasonable classification has been the test for such cases. This was decided in the long list of cases on criminal prosecutions, such as the Federal Court case of *Datuk Hj Harun Idris bin Hj v Public Prosecutor* [1977] 2 MLJ 155 and followed in the later cases of *Abdul Ghani bin Ali @ Ahmad & Ors v Public Prosecutor* [2001] 3 MLJ 561; [2001] 3 CLJ 769 and *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council) Malaysia, intervener)* [2004] 2 MLJ 257. Learned senior federal counsel however contended that there is a reasonable classification in this case. The classification he says, bear reasonable nexus with the object of Act 505. In determining whether the classification bears the nexus with the object of the law following *Datuk Hj Harun Idris v Public Prosecutor* [1977] 2 MLJ 15 he submitted, one has to ascertain the object of the law from the law itself. The Supreme Court has applied this doctrine in *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165 which held that the court may infer the real object from the whole scheme of the Legal Profession Act 1976. In *Malaysian Bar & Anor* the Legislature is presumed to understand and correctly appreciates the need of its people. Hence the laws are said to have directed to problems manifest by experience and discrimination which are based on adequate grounds.

[33] Learned senior federal counsel contended that Act 505, in particular s 59(1) and 59(2), read together with its title and the preamble as well as item 1 of the State Legislative List in the Ninth Schedule, will show that only Muslim should be the *peguam syarie*. The scheme of Act 505 is first made to be applicable only to Muslims. If the Legal Profession Act 1976 is applicable to all advocates and solicitors, the situation is no different with *peguam syarie*, he said. Besides Act 505 the admission of *peguam syarie* is also found in the Akta Tatacara Mahkamah Syariah (Wilayah Persekutuan) 1998 which requires a *wakalah* as a procedure. According to learned senior federal counsel the Akta Tatacara Mahkamah Syariah falls under the State Legislative List, and it is within the State Legislature to legislate.

FINDINGS

[34] The test on discriminatory laws is encapsulated in the Federal Court

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case of *Datuk Harun bin Haji Idris*. The Federal Court had adopted three of the nine principles based on Indian decisions in dealing the constitutional provisions on laws against discrimination or equal protection provision. The said tests are first, whether the law is discriminatory, if it is not, it is good law. If the law is discriminatory, then because the prohibition on equal treatment is not absolute we need to inquire if it is expressedly allowed by the Constitution or by judicial interpretation. If it is allowed, it is good law and if it is not, the law is said to be void. Secondly discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification provided that:

(a) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different basis such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question

[35] Thirdly there is always a presumption that the Legislature in enacting laws has wide power of classification, operating differently to different group of people to give effect to its policy, and in considering art 8, the impugned law is constitutional.

[36] Having stated that, I will now turn to consider the application of these tests to the facts of the present case. Act 505 had delegated to the *Majlis* the power to make provisions on the qualification of *peguam syarie*. The object of Act 505 relates to, the enforcement and administration of Islamic laws, the constitution and organisation of Syariah courts and related matters in Wilayah Persekutuan. The enforcement and the organisation of the Syariah court include having competent and qualified prosecutors and Religious Enforcement Officers and legal representation by qualified peguam syarie. In the Federal Territories, the *Majlis* in exercising its delegated power made rules, inter alia, that only a Muslim may be admitted as *peguam syarie*. I had made a finding that the Majlis is empowered under s 59(2) to legislate on the qualification of a *peguam syarie*. The power to legislate based on the empowering provision and the broad meaning of the word qualification allows the *Majlis* to impose a condition that only a Muslim may be admitted as *peguam syarie*. I have also pointed out earlier that the requirement of a *peguam syarie* to be a Muslim is made by the *Majlis* as a matter of Syariah requirement, based on the Islamic jurisprudence. The decision of the *Majlis* is based on the some Syariah principle in the decision of the *Muzakarah Jawatankuasa Fatwa*

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Majlis Kebangsaan and also, *Siti Nurhayati bt Mohd Daud v Dato' Mohd Zaidi bin Mohd lain* JH XXII1/1 1428H the High Court Syariah decision in the case of.

[37] I have also noted that, there is at least another school of thought on this requirement and it explains why there are states in Malaysia that allow a non Muslim to be a *peguam syarie*. I have also observed that the *Majlis* in this case had an interpretation that is different for the other states. The wisdom of such a decision is a matter of Syariah interpretation and outside the ambit of this court to adjudicate. However, as I have also stated earlier, a responsible government in its wisdom based on the doctrine of *siasah* as Syariah may adopt any one of the acceptable Syariah views that it deems appropriate and applicable to its people, even if they are in conflict. This is on the presumption that the state government understands the wishes, aspiration and need of its people, it is not for the court to do so or decide what would be in the best interest of the people. The laws are therefore made directed to the problems, manifests by experience and that it discriminates on adequate grounds. Thus if the Legislature deems it necessary that for the purpose of achieving the object of Act 505, it requires a rule that only a Muslim may be admitted as *peguam syarie* and that rule is made directed to the problem, manifest by experience and that it discriminates on adequate grounds, then the law does not violate art 8 of the Federal Constitution. It is therefore a good law.

[38] The case related to the interpretation of art 8 shows that if the law which discriminates is based on reasonable classification it can be held valid as decided in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257. The classification which eventually allows only Muslims to be *peguam syarie* according to Encik Ranjit Singh has no nexus to the object of Act 505, because according to him a non-Muslim as a *peguam syarie* does not detract from the object of Act 505. The object of Act 505 is to enforce and administration of Islamic Law, the constitution and organisation of Syariah courts and related matters. Even a non-Muslim according to Encik Ranjit Singh would be able to assist in achieving that object so long as he has sufficient knowledge in Islamic law.

[39] On the contrary, learned counsel for the *majlis* and senior federal counsel contended that there is another dimension in the approach towards achieving the object of Act 505. This dimension is faith. The *Muzakarah* on *Hukum Melantik Orang Bukan Islam sebagai Peguam Syarie* in exh WMS1 explains the reason in arriving at a rejection of a non Muslim *peguam syarie*. It was made after giving due consideration of the advantages as well as its disadvantages. Based on the various rules cited therein, the *Muzakarah* concluded that a *peguam syarie* must be a Muslim. In other words the person must have faith in the religion of Islam. Faith in Islam is more than either a

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mental agreement with certain facts or a mechanical obedience of certain rules, but rather a person's dedication to God's will and the recognition of His sovereignty. This has consequences for his behaviour in the family, in society and in the state. Without question, the Islamic faith cannot be described as a mere external membership to a religious group or as the theoretical agreement with particular dogma. This seems to be the reason for the classification and it is founded on an intelligible differentia that has a rational relation to object of the rule.

[40] Based on the requirement of faith by the Syariah, in my view there is no irrational differentia in this case as Syariah Court deals specifically with the personal laws of persons professing the religion of Islam. There is a seamless nexus therefore between requiring a *peguam syarie* to be a Muslim, to represent litigants who are Muslims, in the adjudication of Islamic law, which in this country is only applicable to the Muslims vis-a-vis the object of Act 505. Faith being the central in the whole equation. In the *Malaysian Bar* case, the discrimination against lawyers of less than seven years standing from serving the bar or its committee was held to be valid applying the intelligible differentia test. This is because the Supreme Court found that the classification basing on professional experience is based on intelligible differentia. It is in the interest of public that the Bar should be independent and managed by experienced lawyers because such a Bar ensures an experienced and independent judiciary. There is therefore a strong nexus between the durational experience classification and the legislative policy or object of the legislation.

[41] The object of the Act 505 is to enforce and administer Islamic law as well as to constitute and organise of the Syariah courts, and related matters. Having a *peguam syarie* who professes the religion of Islam will no doubt with ease achieved the object of Act 505; faith being a dimension necessary in its approach. In such a case, the classification can be regarded as reasonable as there is nexus between the impugned rule and the object of Act 505. It is therefore my considered view that the impugned r 10, does not contravene art 8 of the Federal Constitution and is therefore not unconstitutional.

WHETHER R 10 IS UNCONSTITUTIONAL IN CONTRAVENTION OF ART 5 AND ART 10

[42] Though art 5 and art 10 of the Federal Constitution were raised by the applicant, however these two areas of the Constitution were not central to the challenge posed by the applicant. For completeness however, on art 5 the Federal Court case of *Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 4 MLJ 1; [2010] 3 CLJ 643 has erased doubts on the meaning of the right to life in art 5(1). The Federal Court uses the definition of 'life' in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72;

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[2002] 4 CLJ 105, to exclude the right to livelihood. Thus the allegation by the applicant on the loss of the livelihood is misplaced because the applicant is not deprived to practice her profession as an advocate and solicitor in the civil court. The relationship between art 5(1) and art 8(1) is best summed up in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 as this:

> … it is clear from the authorities thus far discussed that 'in accordance with law' in art 5(1) refers to a law that is fair and just and not merely any enacted law however arbitrary or unjust it may be. So long as the law does not produce any unfair discrimination it must be upheld. This is the effect of the equality limb art 8(1)… if s 46A passes the test of the fairness as housed in the equality clause then it is a fair law and therefore is a valid law for the purposes of art 5(1) …

[43] On art 10, which guarantees the right to association is of no relevance to this application. This is because art 10 deals with the right to form association and the applicant cannot enforce her application or force the respondent to accept her application as a member.

DECISION

[44] Based on all the above reasons I dismissed the application of the applicant in encl 1 and I also dismissed the first respondent's application in encl 17. As this matter involves an issue of public interest, I order for each party to bear its own costs.

Applicant's and first respondent's application dismissed.

Reported by Kohila Nesan